

Under 37 CFR § 1.137(a) is attached hereto as Exhibit A.

No notice of Abandonment has been received as of the date of the filing of the present petition.

In reply to the Final Office Action Under 37 CFR § 1.113 Applicant submitted a Request for Continued Examination Under 37 CFR § 1.114 on December 7, 2004, accompanied by the required fee. A copy of the Request for Continued Examination filed on December 7, 2004 is attached hereto as Exhibit B.

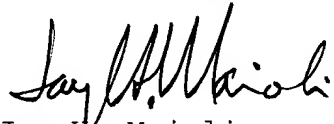
It is submitted that since the above-identified application was filed on or after June 8, 1995, no terminal disclaimer is required.

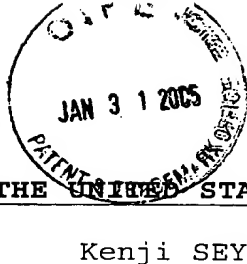
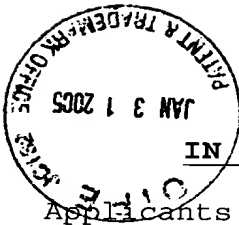
The entire delay in filing the required reply from the due date for the required reply until the filing of a grantable petition under 37 CFR § 1.137(b) was unintentional.

The petition fee for other than a small entity under 37 CFR § 1.17(m) is submitted herewith. Any deficiency or overpayment of fees should be charged or credited to Deposit Account No. 03-3125.

Revival of the above-identified application and an early and favorable examination on the merits are earnestly solicited.

Respectfully submitted,
COOPER & DUNHAM LLP


Jay H. Maioli
Reg. No. 27,213



6715/56610

DAC

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: Kenji SEYA
Serial No.: 09/297,038
Filed: April 26, 1999
For: INFORMATION PROCESSING APPARATUS AND METHOD
Group A.U.: 2654
Examiner: D. D. Knepper

I hereby certify that this paper is being deposited this date with the U.S. Postal Service in first class mail addressed to: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

Jay H. Maioli
Jay H. Maioli
Reg. No. 27,213

Date
01.28.05

January 28, 2005
1185 Avenue of the Americas
New York, NY 10036
(212) 278-0400

PETITION FOR REVIVAL OF APPLICATION FOR PATENT ABANDONED
UNINTENTIONALLY UNDER 37 CFR § 1.137(b)

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 CFR § 1.137(b), Applicant hereby petitions for revival of the above-identified application for patent abandoned unintentionally.

The above-identified application became abandoned for failure to reply to a final Office Action dated April 7, 2004.

Applicant submitted a Petition for Revival of Application Under 37 CFR § 1.137(a) on December 7, 2004. A copy of the Decision dismissing the Petition for Revival of Application

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allowance and, therefore, was not a proper reply,⁸ does not constitute a showing of unavoidable delay.

CONCLUSION

In the absence of the proper showing, the instant petition under 37 C.F.R. §1.137(a) hereby is **dismissed**.

ALTERNATIVE VENUE

It appears that Petitioner will be unable to make a showing of unavoidable delay. Petitioner's only alternative to irretrievable abandonment is to file a petition under 37 C.F.R. §1.137(b) (state therein that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. §1.137(b) was unintentional").

Thus, Petitioner may wish to supplement the petition to plead alternatively under 37 C.F.R. §1.137(b) wherein the "showing" burden is much less onerous.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By FAX: IFW Formal Filings
(703) 872-9306
ATTN.: Office of Petitions

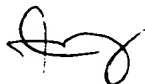
By hand: Mail Stop: Petition
Customer Service Window
Randolph Building
401 Dulany Street
Alexandria, VA 22314

⁸ A proper reply is a an amendment *prima facie* placing the application in condition for allowance, a Notice of Appeal, or a CPA or RCE (with fee and submission). (See: MPEP §711.03(c).)

Application No. 09/297,038

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Telephone inquiries concerning this decision may be directed to the undersigned at (571) 272-3214.

A handwritten signature in black ink, appearing to read "J. Gillon", with a stylized flourish at the end.

John J. Gillon, Jr.
Senior Attorney
Office of Petitions

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Kenji SEYA
Serial No.: 09/297,038
Filed: April 26, 1999
For: INFORMATION PROCESSING APPARATUS AND METHOD
Group A.U.: 2654
Examiner: D. D. Knepper

I hereby certify that this paper is being deposited this date with the
U.S. Postal Service as first class mail addressed to: Mail Stop
Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA
22315-1450.

JAY H. MAIOLI
Reg. No. 27,213

Date

Jay H. Maioli
12.07.04

December 7, 2004
1185 Avenue of the Americas
New York, NY 10036
(212) 278-0400

REQUEST FOR CONTINUED EXAMINATION UNDER 37 CFR § 1.114

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicant hereby requests continued examination of the
above-identified application under 37 CFR § 1.114.

It is respectfully requested that the Amendment After
Final Action Under 37 CFR § 1.116 filed July 7, 2004 be
considered as a submission under 37 CFR § 1.114.



UNITED STATES PATENT AND TRADEMARK OFFICE

COMMISSIONER FOR PATENTS
UNITED STATES PATENT AND TRADEMARK OFFICE
P.O. Box 1450
ALEXANDRIA, VA 22313-1450
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JGJR: 01-05

Paper No: __

JAN 19 2005

JAY H MAIOLI
COOPER & DUNHAM
1185 AVENUE OF THE AMERICAS
NEW YORK, NY 10036

COPY MAILED

JAN 14 2005

OFFICE OF PETITIONS

In re Application of
Bryant
Application No. 09/297,038
Filing Date: 26 April, 1999
Attorney Docket No. 6715/56610

This is a decision on the petition filed on 10 December, 2004, alleging, *inter alia*, unavoidable delay under 37 C.F.R. §1.137(a).

For the reasons set forth below, the petition as considered under 37 C.F.R. §1.137(a) is
DISMISSED.

NOTES:

- (1) Any petition (and fee) for reconsideration of this decision under 37 C.F.R. §1.137(a) (as to unavoidable delay) or an alternative request for relief under 37 C.F.R. §1.137(b)¹ (as to unintentional delay) must be submitted within two (2)

¹ Effective December 1, 1997, the provisions of 37 C.F.R. §1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 C.F.R. §1.137(b). a grantable petition filed under the provisions of 37 C.F.R. §1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 C.F.R. §1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. §1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee set forth in 37 C.F.R. §1.20(d)) required pursuant to 37 C.F.R. §1.137(c). (Emphasis supplied.)

satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).²

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, abandoned application under this congressional grant of authority. The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition.³

Delays in responding properly raise the question whether delays are unavoidable.⁴ Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).⁵ And the Petitioner must be diligent in attending to the matter.⁶ Failure to do so does not constitute the care required under *Pratt*, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.⁷)

The requirements for a grantable petition under 37 C.F.R. §1.137(a) are the petition and fee, a showing of unavoidable delay, a proper reply, and—where appropriate—a terminal disclaimer and fee.

Petitioner has failed to satisfy the "showing" requirement. The fact that Petitioner elected to file an amendment after final, which did not *prima facie* place the application in condition for

² 35 U.S.C. §133 provides:

35 U.S.C. §133 Time for prosecuting application.

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

³ Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

⁴ See: *Changes to Patent Practice and Procedure, Final Rule Notice*, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

⁵ See: *In re Application of G*, 11 USPQ2d 1378, 1380 (Comm'r Pat. 1989).

⁶ See: *Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment*, 1124 Off. Gaz. Pat. Office 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 Off. Gaz. Pat. Office *supra*.

⁷ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

months from the mail date of this decision. Extensions of time under 37 C.F.R. §1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. §1.137(a)"; and/or "Petition under 37 C.F.R. §1.137(b)";

- (2) Thereafter, there will be no further reconsideration of this matter.

BACKGROUND

The record reflects that:

- a final Office action was mailed on 7 April, 2004;
- Petitioner filed an amendment after final on 12 July, 2004, over a 7 July, 2004, certificate of mail;
- on 18 November, 2004, the Examiner mailed an Advisory Action indicating, *inter alia*, that the amendment after final did not place the application in condition for allowance;
- thus, Petitioner failed to reply timely and properly to the final Office action of 7 April, 2004, with a reply due absent extension of time on or before 7 July, 2004;
- the application went abandoned after midnight 7 July, 2004;
- no Notice of Abandonment was mailed before the instant petition was filed;
- accompanying the instant petition is a request for continued examination (RCE) with fee, and Petitioner has identified his amendment after final as his submission under the regulation;
- Petitioner alleges unavoidable delay, but support the allegation only with his statement that he filed his amendment after final and the Examiner did not address the matter until after the end of the full statutory period.

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the

The fee set forth in 37 CFR § 1.17(e) is submitted herewith.

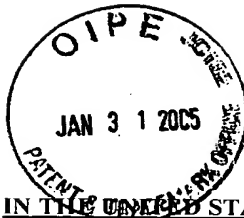
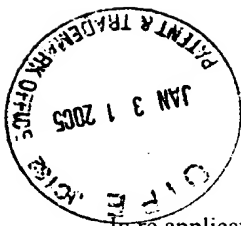
The Commissioner is authorized to charge any additional fees that may be due in connection with this request or credit any overpayment to our Deposit Account No. 03-3125.

Continued examination of the above-identified application is respectfully requested.

Respectfully submitted,
COOPER & DUNHAM, LLP

A handwritten signature in black ink, appearing to read "Jay H. Maioli", written in a cursive style.

Jay H. Maioli
Reg. No. 27,213



6715/56610

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Kenji SEYA
Serial No.: 09/297,038
Filed: April 26, 1999
For: INFORMATION PROCESSING APPARATUS AND METHOD
Date: January 28, 2005

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Transmitted herewith is a Petition for Revival of Application Under 37 CFR § 1.137(b) in the above-identified application.

- ☐ No fee is required.
- ☒ The fee has been calculated as shown below.
- ☐ Total claims in excess of ___ previously paid for, at \$18 (\$9)
- ☐ Independent claims in excess of ___ previously paid for, at \$84 (\$42)
- ☐ Additional Fee for this Amendment
- ☐ This Response is being filed within the ___ first month, ___ second month, ___ third month, ___ fourth month, ___ fifth month following the expiration of the term originally set therefor. Applicants Petition for an extension, and the fee of ___ \$110 (\$55), ___ \$400 (\$200), ___ \$920 (\$460), ___ \$1,440 (\$720), ___ \$1,960 (\$980) is due and paid herewith.
- ☐ The fee of \$ ___ set by 37 CFR 1.17(p) for the Information Disclosure Statement is due and paid herewith.
- ☒ A check in the amount of \$ 1500.00 is attached.
- ☒ Please charge any additional fees or credit any overpayment to Deposit Account No. 03-3125.

COOPER & DUNHAM, LLP

Jay H. Maioli
Reg. No. 27,213
COOPER & DUNHAM, LLP
1185 Avenue of the Americas
New York, NY 10036
Telephone (212) 278-0400

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